92-172

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

THE STATE OF COLORADO,
Petitioner,
vs.
NORRIS JONES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

Despite an initial illegal arrest, is the *Brown v. Illinois* attenuation analysis even applicable to a confession made after police have independently acquired probable cause to lawfully arrest and detain the defendant; and in any event is the discovery of probable cause, whether or not it is ever communicated to the defendant or has any effect on the exercise of his free will, a significant factor in determining whether his subsequent confession is the fruit of an initial illegal arrest?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

APPENDIX A A-1

APPENDIX B B-1

TABLE OF AUTHORITIES

PAGE

CASES

Barry v. New Jersey 9
454 U.S. 1017 (1981)

Brown v. Illinois,
422 U.S. 590 (1975) 7, 8

Dunaway v. New York,
442 U.S. 200 (1979) 8

In Interest of R.S.,
418 N.E.2d 195 (Ill.App.Ct. 1981) 9

Murray v. United States,
487 U.S. 533 (1988) 8, 12

New York v. Harris,
110 S.Ct. 1640 (1990) 6, 11, 12

Nix v. Williams,
467 U.S. 431 (1984) 8

People v. Jones,
91SA304 (Colo. April 27, 1992) 1

People v. Lekas,
508 N.E.2d 221 (Ill.App.Ct. 1987) 9

People v. Pierson,
519 N.E.2d 1185 (Ill.App.Ct. 1988) 9

TABLE OF AUTHORITIES

PAGE

CASES

State v. Barry,
429 A.2d 581 (N.J. 1981) 9, 11

State v. Reffitt,
702 P.2d 681 (Ariz. 1985) 9, 10

State v. Stevens,
574 So.2d 197 (Fla.Dist.Ct.App. 1991) 9, 10

Taylor v. Alabama,
457 U.S. 687 (1982) 8

Townsley v. State,
652 S.W.2d 791 (Tex.Crim.App. 1983) 10

United States v. Cherry,
759 F.2d 1196 (5th Cir. 1985) 10

United States v. Crews,
445 U.S. 463 (1980) 11

United States v. Gutierrez-Guajardo,
699 F.Supp. 608 (S.D.Tex. 1988) 8

United States v. Leon,
468 U.S. 897 (1984) 12

TABLE OF AUTHORITIES

PAGE

CASES

United States v. Maier,
720 F.2d 978 (8th Cir. 1983) 10

United States v. Manuel,
706 F.2d 908 (9th Cir. 1983) 10

United States v. Morris,
597 F.2d 341 (2d Cir. 1979) 10

United States v. Tucker,
610 F.2d 1007 (2d Cir. 1979) 10

Wicker v. State,
667 S.W.2d 137 (Tex.Crim.App. 1984) 11

Wong Sun v. United States,
371 U.S. 471 (1963) 7, 9

STATUTES

Colo. R. App. P. 4.1 2
Colo. R. Crim. P. 4.1 2
Colo. Rev. Stat. §16-12-102(2) 2

OTHER AUTHORITIES

4 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §11.4(a) (2d ed. 1987) 12

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OPINION BELOW

The opinion of the Colorado Supreme Court, *People v. Jones*, 91SA304 (Colo. April 27, 1992), is reported at 828 P.2d 797 and is reprinted as Appendix A.

A transcript of the findings of fact and conclusions of law of the district court is reprinted as Appendix B.

JURISDICTION

The jurisdiction of this court is invoked by writ of certiorari, pursuant to 28 U.S.C. §1257 (1966), on the ground that the highest court of the state of Colorado has rendered a final judgment in which a right, privilege or immunity is specially set up or claimed under the Constitution of the United States. The opinion of the Colorado Supreme Court resolving the interlocutory

appeal below was issued on April 27, 1992. No petition for rehearing is permitted. *See* Colo. R. App. P. 4.1.[1]

CONSTITUTIONAL PROVISIONS

1. U.S. Const. Amend. IV:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The defendant was charged with first degree murder in Denver, Colorado. The district court heard and granted his motion to suppress his confession and the murder weapon, found as result of it. The People filed an interlocutory appeal pursuant to Colo. Rev. Stat. §16-12-102(2) and Colo. R. Crim. P. 4.1, and the Colorado Supreme Court affirmed the suppression order.

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[1]Although the respondent has yet to be tried in state court, the suppression ruling challenged herein is a "final judgment" within the meaning of 28 U.S.C. §1257 because the federal claim has been finally decided and later review cannot be had, whatever the ultimate outcome of the case, *see New York v. Quarles,* 467 U.S. 652 n.1 (1984), as has previously been recognized by this court. *See, e.g., Colorado v. Bertine,* 470 U.S. 367 (1987); *Colorado v. Connelly,* 479 U.S. 157 (1986).

The prosecution arose from a homicide investigated by Detectives DeMott and DeSanti in January 1991. After discovering the decomposing body of a man who had apparently been beaten to death in his apartment, they were given a description by the apartment manager of a distinctive looking man who had been with the victim several weeks earlier and whom DeMott recognized as someone named "Norris" he had encountered a number of times on East Colfax Avenue when he was a patrol officer. The detectives decided to cruise Colfax before returning to their office, so they drove 1/2 block from the apartment to a cafe on East Colfax where they immediately spotted the defendant, Norris Jones, sitting at the counter.

The detectives introduced themselves, and at their request Norris agreed to talk with them and to go with them to the police station. He appeared to be a street person, wearing several layers of baggy clothing, so for the officers' safety DeMott patted him down, and still being unable to tell whether he had a weapon, handcuffed him for the ride to the station, less than a dozen blocks away. On their way, they drove back to the other end of the block to make sure that Norris was the man the apartment manager had seen with the victim.

When they arrived at the police station, they removed the handcuffs, asked Norris for his outer clothing, briefly felt his jackets for weapons, and offered him a seat in one of the offices. While DeSanti checked to see if he had a record, DeMott offered him a cup of coffee and used a written form to warn him of his *Miranda* rights, which he waived by executing the waiver portion. Norris at first admitted knowing the victim but denied any involvement in the crime. After only a few questions, DeMott told Norris that a fingerprint had been found in some blood on

the railing, and Norris responded, "How do you know I didn't pick my nose?" When DeMott explained he meant that the blood would be that of the victim rather than Norris, Norris volunteered that he would go to prison for murder if he told what happened. After a brief, one-sentence encouragement to tell his side, he told that the victim had tried to have sex with him and that he grabbed a hammer and began to strike him with it.

The defendant agreed to give a videotaped statement. During the 15 or so minutes between statements, DeMott learned from DeSanti that there was a general sessions warrant for the defendant's arrest but also that the fingerprint from the railing was insufficient for testing. Before the second interview DeMott reminded the defendant of his *Miranda* rights. In a more detailed statement, the defendant admitted beating the victim while he slept[2] and told where he had put the hammer, which the police then retrieved.

The district court held that despite the defendant's agreement to go downtown with the police, they in effect arrested him without probable cause by frisking, cuffing, moving, and subjecting him to a one-on-one show-up.[3]

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[2]This fact appears only in the videotaped confession, which was included in the record of the interlocutory appeal. Everything else in this Statement is supported in one or both of the court rulings below. *See* Appendices A & B.

[3] The Colorado Supreme Court's statement that the People conceded the defendant's initial illegal arrest is accurate only in so far as it means that the People did not specifically appeal that determination by the district court.

With regard to the question whether the discovery of a warrant, especially in conjunction with the absence of bad faith or egregious conduct by the officers, attenuated the taint of any illegality, both the district court and the Colorado Supreme Court held that discovery of a warrant could not be considered as an intervening factor because a warrant whose existence had not even been communicated to the defendant could not possibly have "contributed to his ability to consider his options carefully and objectively and to exercise his free will"[4] (Appx. B-10).

At the suppression hearing the People actively argued the consensual nature of the encounter and on appeal took the position that the characterization of the initial encounter as illegal was inconsequential because in either event the absence of egregious police misconduct, in conjunction with other attenuating factors, should have made the defendant's subsequent videotaped confession admissible.

[4] Although the Colorado Supreme Court's opinion makes reference to both federal and Colorado caselaw, its holding is based on federal constitutional law. Colorado has never suggested that it has any separate, state-grounded attenuation doctrine, *see, e.g., McCall v. People*, 623 P.2d 397, 403-4 (Colo. 1981) (explaining and applying the Fourth Amendment poisonous tree doctrine to confession following illegal arrest), and its holding in this case was clearly based on federal law. *See People v. Inman*, 765 P.2d 577, 578-9 (Colo. 1988) (in absence of clear statement that suppression ruling is grounded on state as opposed to federal constitutional law, Colorado Supreme Court will resolve case on basis of federal constitutional law). *See also Michigan v. Long*, 463 U.S.

REASONS FOR GRANTING THE WRIT

In light of this court's recent holding in *New York v. Harris*, Colorado's suppression ruling provides a particularly timely vehicle for finally determining the relationship between an independent source for continued lawful detention and the *Brown v. Illinois* attenuation analysis.

This court should grant the writ and review the holding of the Colorado Supreme Court because it has construed the federal law governing the exclusion of confessions as the fruit of an initial illegal arrest in a way that conflicts with doctrines developed over more than a half-century limiting the sweep of the derivative evidence rule, and because the rationale for Colorado's holding stems from a fundamental misconception about the attenuation doctrine that is shared by a number of federal and state courts. Although the problem is longstanding and over the years has resulted in the loss of considerable reliable evidence without corresponding benefit, this case serves as a particularly timely vehicle for resolving it and simultaneously "fleshing out" the underlying principle of *New York v. Harris*, 110 S.Ct. 1640 (1990), which held that the *Brown v. Illinois* attenuation analysis was not appropriate where the defendant was not being held unlawfully when he confessed and where his confession was not the fruit of having been arrested without a warrant in the home rather than someplace else.

This case also presents a particularly good opportunity for review by certiorari because it is an interlocutory

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1832 (1983).

appeal from a suppression ruling, involving an extremely small record of a two-witness hearing, minimizing any disputes of historical fact and making it extremely unlikely that the ultimate rule of decision could involve issues that are not already apparent. While a great deal is at stake in this individual case, the issues of the case are not case-specific but call for the articulation of legal standards that will necessarily apply broadly to the exclusion of reliable confessions as the "fruit of the poisonous tree." Similarly, the generic nature of the situation and the lack of any egregious police behavior call for a policy decision by this court and give the court great latitude with regard to the breadth of the ultimate rule of decision.

The legal conflict arises directly from the language of *Brown v. Illinois*, 422 U.S. 590 (1975), itself. In articulating its multi-factor attenuation test for determining the admissibility of a confession after an illegal arrest, *Brown* cites *Wong Sun v. United States*, 371 U.S. 471 (1963), for the proposition that breaking the causal chain requires a showing that the confession not only meets constitutional standards of voluntariness but also is "sufficiently an act of free will to purge the primary taint." *Brown* at 602. While many cases relying on *Brown* merely imply as much, Colorado expressly holds here that the attenuation analysis *only* applies to factors that are actually known to the defendant and affect his decision to make a statement. The independent discovery of an outstanding warrant or probable cause to arrest, unless communicated to the defendant, by the very terms of the attenuation analysis cannot play any part.

However, even *Wong Sun* recognized that the reach of the derivative evidence rule is limited not only by the "attenuated connection" test but also by an "independent

source." *Id.*, 371 U.S. at 437. In *Wong Sun* the court merely established that all confessions are not automatically the "fruit of the poisonous tree" simply because they would not have come to light *but for* the illegal activity of the police, and since neither *Brown* nor this court's other applications of the *Brown* attenuation analysis, *see Dunaway v. New York*, 442 U.S. 200 (1979); *Taylor v. Alabama*, 457 U.S. 687 (1982), involved independent grounds for lawful detention, they merely refined the *attenuation* analysis for post-illegal arrest statements. If these cases intended that meeting the attenuated connection test not only be a *sufficient* condition for admission of a statement made after an illegal arrest but also a *necessary* one, then they went well beyond the original purpose of the exclusionary rule, which was to put the police in the same, but not a worse, position than they would have been in if no error or misconduct had occurred, as is reflected in the related derivative evidence doctrines of "independent source," *see Murray v. United States*, 487 U.S. 533 (1988), and "inevitable discovery." *See Nix v. Williams*, 467 U.S. 431 (1984).

Colorado's view that satisfying the attenuation analysis is the *only* way post-illegal arrest statements can escape the exclusionary rule is neither unique nor new. Sensing the importance of intervening grounds to arrest, both federal and state courts have tried virtually every conceivable way to give them meaning within the apparent limitations of the *Brown* analysis. Some, like Colorado, find no place in the analysis for these new grounds, *see, e.g., United States v. Gutierrez-Guajardo*, 699 F.Supp. 608 (S.D.Tex. 1988) ("Facts discovered an hour or more later cannot serve to retroactively justify the arrest"), unless the defendant is confronted with them, in which case their effect on the

defendant's decision to confess may be considered as an intervening circumstance to be balanced along with the other attenuation factors. *See, e.g., State v. Stevens*, 574 So.2d 197 (Fla.Dist.Ct.App. 1991) (evidence amounting to probable cause to arrest just prior to confession, *and with which defendant was confronted*, amounted to intervening circumstance); *People v. Lekas*, 508 N.E.2d 221 (Ill.App. Ct. 1987) (*confrontation* with new evidence identified as intervening circumstance), *cert denied*, 485 U.S. 942 (1988); *In Interest of R.S.*, 418 N.E.2d 195 (Ill.App.Ct. 1981) (caselaw has identified one kind of intervening circumstance: *confrontation* of the arrestee with untainted evidence which produces a voluntary desire to confess); *State v. Barry*, 429 A.2d 581 (N.J. 1981)(recovered guns and codefendant's confession implicating defendant, "*which were shown to defendant,*" severed any possible chain of causation), *cert. denied*, 454 U.S. 1017 (1981). Three justices of this court filed a memorandum opinion dissenting from the denial of certiorari in *Barry,* noting that a number of courts had followed the same approach of treating the confrontation of the defendant with new evidence as an intervening circumstance but expressing doubts about whether even this approach could be squared with *Brown. Barry v. New Jersey*, 454 U.S. at 1019 & n.1.

An apparent majority of courts simply ignore the *Wong Sun* language quoted in *Brown* and treat the discovery of probable cause as an intervening circumstance in the attenuation analysis. Some take pains to indicate that it is merely one factor in the balance. *See, e.g., People v. Pierson,* 519 N.E.2d 1185 (Ill.App.Ct. 1988) (intervening acquisition of probable cause is important factor in attenuation analysis), *cert denied,* 488 U.S. 925 (1988); *State v. Reffitt*, 702 P.2d 681 (Ariz. 1985) (existence of

probable cause is "one such intervening factor" that tends to break causal chain); *United States v. Maier*, 720 F.2d 978 (8th Cir. 1983) ("intervening events" that gave probable cause along with other *Brown* factors attenuated connection with illegal arrest), *cert denied*, 466 U.S. 970 (1984); *United States v. Manuel*, 706 F.2d 908 (9th Cir. 1983) (intervening discovery of sufficient evidence to arrest along with other *Brown* factors purged taint); *see also United States v. Cherry*, 759 F.2d 1196 (5th Cir. 1985)(intervening discovery of probable cause in context of consent to search following illegal arrest is factor but insufficient to be dispositive in every case), *cert denied*, 479 U.S. 1056 (1987). Other courts apparently treat this factor as dispositive. *See, e.g., Townsley v. State*, 652 S.W.2d 791 (Tex.Cr.App. 1983) (after police discovered probable cause, defendant was legally confined and subsequent statements were therefore not tainted by illegal arrest); *United States v. Tucker*, 610 F.2d 1007 (2d Cir. 1979) (intervening probable cause would probably dissipate the taint); *United States v. Morris*, 597 F.2d 341 (2d Cir. 1979) (subsequent probable cause purged the initial illegal arrest). Several jurisdictions believe that this latter approach is what the three dissenting justices in *Barry* were concerned about. *See State v. Stevens*, 574 So.2d 197, 204 n.2 (Fla.Dist.Ct.App. 1991) (characterizing the question that troubled the three Supreme Court dissenters as whether in any case where probable cause is fortuitously developed after the illegal arrest but prior to the accused's confession, the Fourth Amendment has been satisfied); *State v. Reffitt*, 702 P.2d 681, 188 n.3 (Ariz. 1985) (same).

At least one jurisdiction has held that where the intervening ground to arrest was an indictment, it not only satisfied the attenuation analysis but also amounted to an

independent source. Wicker v. State, 667 S.W.2d 137 (Tex.Crim.App. 1984).

While *Barry* may not have been the appropriate case to present this issue in 1981, resolution of the question has become timely, in large part because of other developments regarding the exclusionary rule and the independent source doctrine generally, and the attenuation doctrine specifically. It is at least clear now that the *Brown* attenuation analysis is not the appropriate admissibility test for *all* post-illegal arrest confessions, *see New York v. Harris*, 110 S.Ct. 1640 (1990) (not appropriate analysis for confession after warrantless arrest in home), and the underlying rationale in *Harris* has implications far broader than the actual holding of in that case. The *Harris* court reasoned: 1) that "the attenuation analysis is only appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal governmental activity,'" *id.* at 1643 (quoting from *United States v. Crews*, 445 U.S. 463, 471 (1980)); 2) that the illegal government activity in post-illegal arrest confession cases is the "wrongful detention" itself, *Harris* at 1644; and 3) that Harris was not unlawfully in custody because the officers had probable cause and could have immediately rearrested him if he were momentarily released. *Id.* at 1643.

Although the specific "illegality" involved in the arrest in *Harris* was the absence of a warrant for an arrest in the home, the court held that unless the defendant made his statement while the police were illegally in his home, the only "illegal governmental activity" of which his statement could be the product would be a "wrongful detention." *Where police, independently of any wrongful arrest, acquire probable cause to arrest and detain the defendant before his*

statement is made, the statement cannot be the product of wrongful detention, and therefore the "threshold" requirement for application of the attenuation analysis is not met. The attenuation analysis determines whether evidence may still not be "fruit of the poisonous tree" even though it would not have been found "but for" the prior illegality. If the evidence fails to meet even the "but for" test, it is clearly not "fruit of the poisonous tree." *See generally* 4 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §11.4(a) at 374 (2d ed. 1987). This is the underlying notion supporting the independent source doctrine, and it appears to be the basis for this court's holding in *New York v. Harris.*

At least since *United States v. Leon*, 468 U.S. 897 (1984), it has been clear that the scope of the exclusionary rule is a matter of policy in the nature of a balancing of costs and benefits to society. In holding that the independent source doctrine applies not only to derivative evidence but even to the immediate product of a Fourth Amendment violation, *see Murray v. United States*, 487 U.S. 533 (1988), this court has recently reemphasized "the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied." *Id.* at 542. To make "attenuation" the *exclusive* limitation on the exclusionary rule in the context of post-illegal arrest statements fails, without any clear reason, to give effect to this important policy, which applies to all other Fourth, Fifth, and Sixth Amendment violations. For all of the reasons cited in *Harris*, at 1644, the incremental deterrent value of suppressing statements like those in this case would be minimal, but would impose a serious cost on the police (and society) even though the police had grounds to

have the defendant lawfully in custody without regard to any earlier error or violation.

Whether or not this encounter and escort to the police station should have been considered voluntary and therefore no Fourth Amendment violation at all, it is at least clear for purposes of the attenuation doctrine that the police were not acting egregiously but were trying to balance the very real safety considerations created by the situation with their duty to investigate a murder by finding out information that the defendant appeared willing to give. Even if intervening independent grounds to arrest were merely one factor to be balanced against such things as the flagrancy and purposefulness of police misconduct, this confession should not be suppressed. It is a strange system of justice that penalizes society and victims by freeing a confessed killer because police ironically had the "good" fortune to stumble upon him less than a block from the scene rather than returning to the station and discovering an outstanding warrant.

Respectfully submitted,

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APPENDIX A

SUPREME COURT, STATE OF COLORADO
No. 91SA304 April 27, 1992

The PEOPLE of the State of Colorado,
Plaintiff-Appellant,
v.
Norris JONES,
Defendant-Appellee.

Interlocutory Appeal from District Court, City and County of Denver, Honorable Paul A. Markson, Jr., Judge
EN BANC RULING AFFIRMED
JUSTICE MULLARKEY delivered the Opinion of the Court.

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The People, pursuant to C.A.R. 4.1, appeal the district court's ruling suppressing a videotaped confession and physical evidence on the grounds that they were the product of an illegal arrest. The People do not challenge the suppression of an earlier, unrecorded confession. Conceding that the defendant was illegally arrested and

that the first confession was properly suppressed, the People argue that the circumstances surrounding the second, videotaped confession were sufficient to attenuate the taint of the illegal arrest and to permit the admission of the videotaped confession and the murder weapon. We affirm.

I.

Detectives DeMott and DeSanti reported to a Denver apartment in response to a homicide call. When they arrived at the scene, they discovered the body of the victim lying on a fold-out bed, dressed only in boxer shorts. The victim had died as a result of being beaten repeatedly on the head.

The detectives and crime laboratory crew searched the scene. Detective DeMott observed a blood stain on a stair rail which was located outside of the apartment, but inside the apartment building, and gave orders for the laboratory crew to lift what appeared to be a fingerprint in the blood.

During the search of the scene, the detectives also learned from another officer that the apartment manager had last seen the victim about two weeks earlier. The apartment manager had also stated that he had occasionally seen the victim with a man. The manager had described a black man with teeth problems, whom he had seen on East Colfax listening to a portable stereo and talking to himself. Detective DeMott recognized this description as being that of a man, known to him as "Norris," whom he had also seen several times on East Colfax when he was a patrol officer.

The two detectives, wearing civilian clothes and driving an unmarked car, decided to drive around the East Colfax area to see if they could find "Norris." At approximately 7:00 p.m., the detectives found the man DeMott knew as

"Norris" sitting in a restaurant in the area. They approached Norris Jones, who was wearing portable stereo headphones. DeSanti stood to Jones's left, while DeMott stood to Jones's right. DeMott tapped him on the shoulder to get his attention, and the detectives introduced themselves as police officers and asked Jones if they could speak with him. Jones agreed to go downtown with the officers upon their request. However, while still inside the restaurant, Detective DeMott conducted a pat-down search of Jones, who was wearing several layers of clothing, and then handcuffed Jones.

The detectives then led Jones out of the restaurant and placed him in the police car with his hands still cuffed. They drove back to the scene of the crime and asked the apartment manager to identify Jones as the man he had seen with the victim. Following the manager's positive identification of Jones, the detectives took Jones to the police station for questioning.

When they arrived at the police station, the detectives removed the handcuffs from the defendant, asked him for his outer clothing, briefly felt his jackets for weapons and then offered him a seat in one of the offices. Detective DeMott left to get Jones a cup of coffee, while Detective DeSanti checked to see if Jones had a record. At 7:20 p.m. Detective DeMott returned with the coffee and began advising Jones of his *Miranda*[1] rights. DeMott went through a written form which listed the rights and made a check mark next to each right after he read it to Jones. While Demott read each right, he held the form so that

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[1]*See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Jones could see it. DeMott then asked the defendant if he understood his rights. The defendant answered, "Yep" and signed the form. Jones then signed the section of the form which indicated that he wished to voluntarily talk to the detective.

Detective DeMott told Jones that he was investigating a homicide and informed Jones of the victim's name. DeMott asked Jones if he had known the victim, to which Jones responded affirmatively. More than once, Jones denied any involvement in the crime. When asked when he had last seen the victim, Jones stated that it had been a couple of weeks. DeMott told the defendant that a fingerprint had been found in some blood on the railing near the homicide scene and that the defendant should tell him his side of the story. The following conversation ensued:

> JONES: Well, how do you know I wasn't picking my nose.
>
> DEMOTT: Well, I don't mean that the blood would have been your blood, I mean the blood would have been the blood of the victim.
>
> JONES: Well, I'll go to prison if I tell you -- I'll go to jail for murder.
>
> DEMOTT: Norris, you have to tell us what happened, you have to give us your side of it; otherwise we will never know what your side of the story is.

At that point in the questioning, Jones began to cry and told DeMott that the victim had repeatedly tried to have sex with him, trying to grab him and attempting to remove his clothes, and that Jones had repeatedly pushed the victim away and told the victim that he did not "do this to men." Jones stated that he finally grabbed a hammer

and started to strike the victim to keep him away.

Detective DeMott testified that after Jones made the statement about striking the victim with the hammer, DeMott asked Jones if he would allow the detectives to videotape his statement. Jones agreed. DeMott conceded on cross-examination that in making the remark about the fingerprint, he was hoping to elicit an incriminating response from the defendant. DeMott testified that at some point between Jones's first admission and the videotape DeMott learned that no fingerprint had been lifted because there had been insufficient ridges in the print mark to make a fingerprint comparison. However, DeMott did not inform Jones of this fact.

Detective DeMott left the office in which Jones was sitting and informed Detective DeSanti that Jones had confessed. DeSanti told DeMott that there was a warrant out for Jones's arrest for an unpaid fine on a municipal offense although DeSanti had not verified the warrant's existence. The detectives made no mention of the warrant in their reports and did not locate the warrant thereafter.

Approximately fifteen minutes elapsed between the first confession and the videotaped confession. Detective DeMott began the videotaped interview at 7:52 p.m. by rapidly reminding the defendant of his *Miranda* rights. Then Jones repeated the story he told DeMott earlier. During the videotaped confession, Jones described the specific location in which he had placed the hammer. The trial court described the end of the videotaped interview as follows: "Detective DeMott's attempt to elicit confirmation from the [d]efendant that he had told the [d]efendant he could leave at any time was met with what can be best characterized as a stare of disbelief from the [d]efendant." The second interview ended approximately one hour after

the detectives had first approached Jones in the restaurant.

The defendant was charged with first-degree murder in violation of section 18-3-102(1)(a), 8B C.R.S. (1986). Jones pled not guilty, and filed a motion to suppress statements he made to police and a hammer seized by the police on the grounds that all three were products of an illegal arrest. Evidence was presented at the suppression hearing that Jones is mentally handicapped. The district court granted the defendant's motion and suppressed the statements and evidence.

The court concluded that the defendant was arrested without probable cause in violation of his constitutional rights and that the prosecution had failed to prove that the causal chain between this illegal arrest and the defendant's second confession was broken by intervening events. Therefore, the court suppressed the second, videotaped confession, along with the first confession, as part of the primary illegality. In addition, the court suppressed the hammer on the grounds that it would not have been discovered by the police without the defendant's assistance.

II.

The People concede that the arrest was illegal and that the first confession was properly suppressed. However, the People argue that under *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the second, videotaped confession by Jones was sufficiently attenuated from the illegal arrest to make it admissible along with the derivative evidence of the hammer. In particular, the People argue that although the time span between Jones's arrest and the confessions was short, the police conduct was not egregious and the discovery of the existence of an outstanding warrant constituted a significant intervening factor.

Under the "fruit of the poisonous tree" doctrine, evidence derived from information acquired by the police through unlawful means is not admissible in a criminal prosecution. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; *McCall v. People*, 623 P.2d 397 (Colo.1981); *People v. Saiz*, 620 P.2d 15 (Colo.1980); *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971). However, if the prosecution can show that any connection between official illegality and the prosecution's evidence has "become so attenuated as to dissipate the taint," the evidence will be admissible. *See Wong Sun*, 371 U.S. at 491, 83 S.Ct. at 419 (quoting *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307 (1939)). With respect to the confession, in particular, "[b]reaking the causal chain requires a showing that the confession not only meets constitutional standards of voluntariness but also is 'sufficiently an act of free will to purge the primary taint' of the illegal arrest." *McCall*, 623 P.2d at 403 (quoting *Brown v. Illinois*, 422 U.S. 590, 602, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416 (1975)).

Clearly, the defendant's second confession did not constitute an act of free will sufficient to purge the primary taint of the illegal arrest. Jones's second confession stemmed directly from the first confession which was interrupted by the detective asking Jones if he would repeat the statement on videotape. In fact, only a mere fifteen minutes elapsed between the first and the second confession, during which time the officers prepared the videotape equipment. Further, the circumstances of the illegal arrest did not change between the first and second confession. During that time, Jones was left alone in the same room where he had made his first confession. He did not talk to an attorney, or anyone else, between the

two confessions. We hold that because the second confession was closely related in time and by circumstances to his earlier, illegally induced statement, the second confession is inadmissible, despite the fact that *Miranda* warnings were given before the second interview began. *See Brown*, 422 U.S. at 603-604, 95 S.Ct. at 2261-2262; *McCall*, 623 P.2d at 404; *People v. Corbett*, 190 Colo. 388, 547 P.2d 1264 (1976). *Miranda* warnings, in and of themselves, do not break the causal chain between the primary illegality and the secondary evidence of the confession. *See Brown*, 422 U.S. at 597, 95 S.Ct. at 2258; *Corbett*, 190 Colo. at 392-93, 547 P.2d at 1266-67.

The prosecution argues that the discovery of the warrant before the second confession, in conjunction with the absence of bad faith conduct by the officers, sufficiently weakened the link between the illegal arrest and the confession. Specifically, the People argue that detention of Jones was justified after the warrant was discovered. The People cite *People v. Thompson*, 793 P.2d 1173 (Colo. 1990), and *People v. Gouker*, 665 P.2d 113 (Colo.1983), in support of this argument. Those cases stand for the proposition that an outstanding arrest warrant from another state may provide probable cause to justify a warrantless arrest. In addition, the prosecution relies on *People v. Sosbe*, 789 P.2d 1113 (Colo.1990), in which the police officers initially lacked reasonable grounds to stop the defendant in his car when they began following him, but acquired reasonable grounds when they observed the defendant speeding.

We conclude that the cases cited by the People are inapposite to the present case because the officers in those cases acquired the appropriate grounds to stop or arrest the defendant before they did so. In the warrant cases, the

officers relied on the existence of a *facially valid* outstanding warrant to arrest the defendant. *See Gouker,* 665 P.2d at 117. In *Sosbe*, the officers had reasonable and articulable grounds to stop the defendant based on his conduct in speeding. On the other hand, the interrogating officer in this case did not learn of the warrant until after the defendant had already made his first confession. The detectives chose to forego verification of the warrant altogether and did not rely on its existence in engaging Jones in the second interrogation which had been arranged by Detective DeMott before he became aware of the possible warrant.

We agree with the district court's conclusion that the existence of this unverified warrant, of which the defendant had not been informed, did not contribute to the defendant's ability to exercise his free will. In fact, the evidence supports the conclusion that the defendant's confession did not constitute an act of free will. Thus, the existence of the warrant did not constitute an intervening factor sufficient to remove the taint from the derivative evidence. *See McCall*, 623 P.2d at 403.

III.

Because no significant intervening factor existed to attenuate the evidence from the illegal arrest, we conclude that the confession should be suppressed as "fruit of the poisonous tree." Likewise, the hammer, which was discovered solely through the defendant's statements, also must be suppressed as part of the primary illegality. Accordingly, we affirm the trial court's suppression of the videotaped confession and the hammer.

APPENDIX B

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
CASE NO. 91CR416 COURTROOM 13

ORDER

PEOPLE OF THE STATE OF COLORADO, Plaintiff,

vs.

NORRIS JONES, Defendant.

The Defendant seeks suppression of the statements he gave police officers on January 7, 1991 and any evidence derived from his statements. The Court makes the following findings of fact.

Detectives DeMott and DeSanti received a call on a homicide at 1410 Pearl Street, Apartment 35. They arrived at the scene at 3:50 p.m. They found the body of David Arnold dressed only in boxer shorts lying on a bed. He had been repeatedly beaten on the head and had died at a time earlier than the discovery of the body. Two important things were determined by the investigators while at the scene. Detective DeMott found a blood stain on the stairway railing leading to the apartment. He felt that the stain might contain a fingerprint and directed that the laboratory crew preserve the evidence. In fact, the crew did not preserve the stain or make a lift of the possible fingerprint. The detectives also learned that the

apartment manager had last seen Mr.Arnold about two weeks earlier and that he had seen him occasionally in the company of another man. He described the man as being Black and having problems with his teeth. The manager had also seen the man on East Colfax listening to a Walkman-type radio and talking to himself. Detective DeMott recognized the description as being the description of a man he had seen frequently when he was a patrol officer on East Colfax. He thought the man's first name was Norris. Not only had he seen the man often, he had even contacted him on a couple of prior occasions.

The detectives wrapped-up their scene investigation, and Detective DeMott suggested that they cruise East Colfax looking for Norris before returning to their office. They drove from 1410 Pearl to the next corner, which was Colfax and pulled into the parking lot of the Colorado Cafe. Detective DeMott went into the cafe and observed the man he knew as Norris sitting at the counter drinking coffee. He did not approach Norris, but instead left the cafe and returned to the police vehicle. He told Detective DeSanti that Norris was in the cafe. Both detectives entered the cafe, and Detective DeMott led them to Norris. Detective DeSanti stood on one side of Norris, and Detective Demott stood on the other. Norris, listening to a Walkman-type radio with earphones and drinking coffee, did not notice the detectives. Detective DeMott tapped Norris on the shoulder. Norris looked up at DeMott and stood up. In court, Detective Demott identified the Defendant as Norris. It was now a few minutes past 7:00 p.m..

Detective DeSanti described the Defendant as appearing as a street person, wearing several layers of baggy clothing. He saw Detective DeMott pat the

Defendant down briefly. He did not hear what was said between the two men, but they appeared to know one another. Detective DeMott testified that he identified himself as a police officer; told the Defendant that he wanted to talk to him, and asked him to come downtown with him. The Defendant agreed. Detective DeMott, for the officers' safety, patted the Defendant down. He could not accurately determine if the Defendant was armed through the many layers of clothing he was wearing. While still standing at the counter area of the busy cafe, Detective DeMott cuffed the Defendant's hands behind him. Detective DeSanti was still standing next to the other two men and did not hear Detective DeMott ask or tell the Defendant that he was going to handcuff him and did not hear the Defendant agree to being cuffed.

The detectives led the Defendant out of the cafe, placed him in the unmarked police car with his hands still cuffed behind him, drove the one block back to the scene of the crime and parked the car. Detective DeSanti went into the apartment house and found the manager. He asked the manager to come outside to see if the man they had in their car was the man the manager had seen with Mr. Arnold. While Detective DeSanti was in the apartment house, Detective Demott talked to the Defendant in the police car. He told him again that they were going to go downtown, that he would take the handcuffs off at headquarters, that they would talk and that he could then leave. Detective DeMott thanked the Defendant for his cooperation.

Within just a few minutes, Detective DeSanti returned with the apartment manager and stood on the sidewalk near the car. The manager looked into the car and told the detective that the Defendant was the man he had seen

with the victim before. Detective DeSanti returned to the car, nodded to Detective DeMott, and the detectives drove to headquarters.

They brought the Defendant to the homicide unit offices, took the handcuffs off, asked him for his outer clothing, briefly felt his jackets for weapons and offered him a seat in one of the sergeants' offices. Detective Demott went to get a cup of coffee for the Defendant, and Detective DeSanti began checking the identification bureau for the Defendant's record.

At 7:20 p.m., Detective DeMott returned with the coffee and began advising the Defendant of his rights. He sat on the edge of a desk three or four feet from the Defendant. He showed him People's Exhibit 1, a written advisement of rights. As he said each right, Detective DeMott placed a check mark on the exhibit next to the corresponding right. When he asked the Defendant if he understood the rights, the Defendant said, "Yep". The detective noted his response, and the Defendant signed the form. The detective asked the Defendant whether, knowing his rights and what he was doing, he wished to talk to the detective. The Defendant indicated he would talk to the detective and signed the form again.

Detective DeMott told the Defendant that he was investigating a homicide at 1410 Pearl, Apartment 35 and that the victim was David Arnold. He asked whether the Defendant had known Mr. Arnold, and the Defendant said he had. When asked when he had last seen the victim, the Defendant said it had been a couple weeks. Detective DeMott cannot recall when he learned that no fingerprint comparison could be made from the blood stain on the hallway railing. He testified that it could have been during the interview with the Defendant or even from a lab

technician at the scene. Given the fact that the lab crew did not preserve the "print," the Court finds that Detective DeMott was told at the scene that the "print" had no evidentiary value. Nevertheless, intending to elicit an incriminating response, Detective DeMott told the Defendant that a fingerprint had been found in some blood on the railing. The Defendant said, "How do you know I didn't pick my nose." Further conversation ensued in which the Defendant denied any involvement, and Detective DeMott encouraged the Defendant to tell his side of it. The Defendant confessed and agreed to repeat the confession on videotape.

The first interview lasted fifteen minutes. When Detective DeMott opened the door of the office, he told Detective DeSanti that the Defendant had confessed. Detective DeSanti told Detective DeMott that there might be a warrant out for the Defendant's arrest for an unpaid traffic fine, but that this was unverified. Neither detective attempted to call the county court to determine the status of the possible warrant. Neither relied on the existence of a warrant for any reason. Neither took the Defendant to the county court clerk's office to pay his fine.

Instead, preparations were made for the videotaped interview. The Defendant was left in the sergeant's office until the video room was ready. Detective DeMott led him to the video room, and at 7:52 p.m. began the second interview by asking the Defendant if he remembered being advised of his rights at 7:20 p.m. Detective DeMott rapidly repeated the rights while the Defendant looked at the floor. During this procedure, the Defendant was distracted when the alarm on his watch began buzzing. He reached over and turned it off. Detective DeMott asked the Defendant to repeat the story he had told him before.

Throughout the interview, Detective DeMott reminded the Defendant about what he had said before. He confronted the Defendant with inconsistencies. The detective concluded by reviewing the evening's events with the Defendant and by trying to elicit the Defendant's agreement that he voluntarily accompanied the detectives at the cafe. The Defendant, however, said, "I did come. I didn't fight." Detective DeMott's attempt to elicit confirmation from the Defendant that he had told the Defendant he could leave at any time was met with what can be best characterized as a stare of disbelief from the Defendant. The second interview concluded at 8:09 p.m..

Keeping in mind that the prosecution bears the burden of proof in this instance, the court concludes that the prosecution failed to meet its burden. Accordingly, the Court grants the Defendant's Motion to Suppress Statements and Evidence.

The prosecution characterizes the initial meeting between the Defendant and the detectives as consensual and admits that the confrontation escalated into an investigatory stop. The Court agrees. The prosecution contends, however, that the intrusion into Defendant's life never rose to the level of an arrest. The Court finds this submission untenable.

U.S. v. Chaidez, 919 F.2d 1193 (7th Cir. 1990), cited by the prosecution, discusses the concept of a continuum from consensual contact to arrest. It recognizes that consensual encounters between police officers and those they serve and protect need not be justified by any suspicion. Indeed, such encounters should be fostered and encouraged. On the other hand, *Chaidez* also discusses significant police intrusions, less than arrest, but without having probable cause. The *Chaidez* court concludes, and this Court

agrees, that a constitutional inquiry into reasonableness sometimes permits an extension of an intrusion on less than probable cause in order to allow reasonable police investigation. In such instances, however, *Chaidez* requires a corresponding increase in the amount of evidence the police have indicating that the person being detained has committed or is committing a crime. "Increasing the threshold probability when the intrusiveness increases ensures that privacy interests will be protected . . . without hampering reasonable investigative techniques by the police." *Chaidez, supra*.

The prosecution admits that the police did not have probable cause to arrest the Defendant until he confessed. The only information the detectives had at the time they contacted the Defendant at the Colorado Cafe was that a man meeting his description had been seen on several occasions with Mr. Arnold at this apartment house more than two weeks before the police found Mr. Arnold's body in his apartment. No articulable and objective basis existed to suspect the Defendant of any criminal activity and neither detective claimed he was a suspect. They felt he would be a source of information and wanted to enlist his help in the investigation.

Encountering the Defendant in the cafe to enlist his assistance did not, however, require reasonable suspicion. Encounters that do not entail detention do not require suspicion. *Chaidez, supra*. But without a reasonable suspicion, the extent of permissible intrusion must be extremely limited.

Because the police did not have reasonable suspicion that the Defendant had committed or was committing a crime or that he was armed, no grounds existed for Detective DeMott to pat down the Defendant. The

Defendant may have consented to talk to the officers, but he was not asked, nor did he agree, to being searched.

Detective DeMott rationalizes his use of handcuffs by claiming he could not tell if the Defendant was armed during the pat down and felt that officer safety required that the Defendant be cuffed for the ride down to headquarters. This excuse is faulty in two regards. First, it assumes he had the right to pat the Defendant down in the first place; and second, far less intrusive means existed to interview the Defendant than going downtown to headquarters. The officers could have asked the Defendant to join them for a cup of coffee at one of the tables. They could have asked him to step outside. If it had been too cold to stand outside, they could have asked him to sit in their car. The consensual nature of the encounter evaporated as soon as suggestions of traveling some distance were made, the Defendant was frisked, and his hands were cuffed behind him. The nature of the intrusion exceeded its reasonable scope and purpose.

The intrusion did not stop there, however. After surrounding the Defendant in a public place, searching him, cuffing him and leading him out of the cafe to their car, they took him to the scene of the crime for a one-on-one lineup procedure. The only new information gained at this point is that the apartment manager confirmed that the Defendant was the person he had previously described. At headquarters, although the handcuffs were taken off, the Defendant was also required to take his coats off and give them to the police. He was advised of his rights, and for the first time, was told that the police wanted to take to him about a homicide. In an attempt to elicit a response from the Defendant, Detective DeMott confronted him with the bloody fingerprint he knew had no

evidentiary value. He refused to accept at least two denials of involvement and encouraged the Defendant to tell his side of the story. "What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions." *Florida v. Royer*, 460 U.S. 491, 75 L.Ed.2d 229, 103 S.Ct. 1319 (1983). All the circumstances of this encounter would communicate to a reasonable person that he or she was not free to leave. *Florida v. Bostick*, 49 CrL 2269 (6-20-91). The police arrested the Defendant without probable cause in violation of the Fourth Amendment and its Colorado equivalent.

The prosecution, therefore, must establish that the confessions the Defendant made to Detective DeMott were so far removed from the illegal arrest that the effect of the initial unconstitutional violation had been dispelled by intervening events. Here, the prosecution does not argue, nor can the Court find, that the Defendant's initial confession was sufficiently distinguishable from the arrest to be admissible. Accordingly, the Court suppresses the first confession.

The question remains whether the connection between the unconstitutional police conduct and the second, videotaped, statement is sufficiently attenuated to permit its introduction at trial. Some of the factors to be considered in determining an attenuation of the initial illegality are: the temporal proximity of the arrest and the confession, an intervening advisement of rights, any other intervening factor, and the purpose and flagrancy of the official misconduct. *People v. Stark*, 682 P.2d 1240, (Colo.App. 1984).

Only fifteen minutes separated the conclusion of the

first confession and the beginning of the second. The Defendant was not offered the opportunity to talk with an attorney. The second confession had been prearranged during the first. When the second began, the Defendant was reminded about the first and was asked to repeat it. During the second, he was confronted with inconsistencies from the first. At the conclusion of the second confession, just over an hour from being contacted by the police in the Colorado Cafe, the Defendant was reminded about the circumstances which ultimately led to his arrest.

Even though the Defendant was advised of his rights at the beginning of the first statement, the fact that the Defendant was advised of his rights is one of the factors which led the Court to the conclusion that the Defendant had been illegally arrested. It is obvious from the tape that Detective DeMott did not adequately readvise the Defendant before the second confession. And even taking both procedures together, *Miranda* warnings, in and of themselves, are not sufficient to overcome the taint of an unconstitutional arrest. *McCall v. People*, 623 P.2d 397 (Colo. 1981).

The prosecution contends that the discovery of the warrant for an unpaid traffic ticket became an ameliorating circumstance intervening between the arrest and second confession. The prosecution fails, however, to adequately explain how the existence of this warrant, which had not been verified, which was not relied upon by the police, and whose existence had not been communicated to the Defendant, could possibly have contributed to his ability to consider his options carefully and objectively and to exercise his free will. See, *Taylor v. Alabama*, 457 U.S. 687, 73 L.Ed.2d 314, 102 S.Ct. 2664 (1982), where the State was unable to explain the significance of a five to ten

minute visit with a girlfriend. Even if the existence of the warrant is an important intervening factor, the prosecution has failed to prove that the warrant was even facially valid, *People v. Gouker*, 665 P.2d 113 (Colo. 1983); and even if facially valid, the defense successfully demonstrated that the warrant was not issued by a magistrate after a determination of probable cause. Lastly, the police did not take the Defendant to the county court clerk's office to pay the fine and did not even determine if the Defendant was able to pay the fine.

The prosecution characterizes the conduct of the detectives as innocent or, at most, unwitting. Perhaps their initial contact with the Defendant was as innocent as they contend. As stated earlier, consensual and candid communication between the police and the citizens they serve and protect should be encouraged. Frisking, cuffing, and leading one out of a crowded cafe discourages this valid policy rather than fosters it. Taking one who is solely an associate of the victim of a homicide to the scene of the crime for a lineup is not merely innocence or inadvertence. While the Court is not faced with the deliberate deception of *McCall, supra*, it is confronted with an increasing pattern of investigatory procedures consciously motivated and designed to result in apprehension of a suspect.

Perhaps more subtle and certainly more invidious than the innocence and inadvertence suggested by the prosecution is the prejudice demonstrated by the facts. The Defendant is a Black man who wanders East Colfax listening to his radio and talking to himself. It is obvious from the tape that he is intellectually limited. He is a street person who carries everything he owns on his person. When an associate of his dies, he is subjected to a request to go downtown, frisked, handcuffed,

prominently displayed in a one-on-one lineup at the scene of the crime and his outer clothing is taken from him. He is read his rights, confronted with a nonexistent bloody fingerprint and disbelieved.

One only has to ask rhetorically what might occur if an associate of Peter Coors were murdered and the police went to another Capitol Hill restaurant, Cliff Young's, to ask Mr. Coors some questions. The answer would not include a request to go downtown, frisking, handcuffing, being placed in a one-on-one lineup, or having his outer clothing taken from him. It would not include an advisement of rights, the mention of a bloody fingerprint, or the disbelief of initial denials.

The prosecution failed to prove that the causal chain between the original unconstitutional conduct of the police and the Defendant's second confession was broken by intervening events. The timing, the dependency of the second confession on the first, the absence of an intervening advisement or any other intervening circumstance, and the purpose and flagrancy of the unconstitutional police conduct demonstrate that the second confession was part and parcel of the primary illegality. Accordingly, the second confession is suppressed.

The prosecution does not argue, and the Court cannot find, that the hammer found by the police as a result of the Defendant's confession would have been discovered inevitably and without the Defendant's assistance. Therefore, the Court must also suppress the hammer.

DATED THIS 29TH DAY OF JULY, 1991.

BY THE COURT: PAUL A. MARKSON, JR.
DISTRICT COURT JUDGE

MOTION FILED
AUG 18 1992

No. 92-172

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

THE STATE OF COLORADO,
Petitioner,
vs.
NORRIS JONES,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI; AND BRIEF OF THE COLORADO ATTORNEY GENERAL AND THE ELEVEN STATES THAT APPEAR ON THE INSIDE COVER AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The Colorado Attorney General and eleven other states, sponsored by their respective attorney generals, move for leave to file a brief in support of the petition for writ of certiorari for the following reasons:

1. Pursuant to Rule 37.5 of the Rules of this Court, normally neither the consent of the parties nor a motion for leave to file an *amicus* brief is necessary when the *amicus* brief is sponsored by a state attorney general's office. Nonetheless, either consent or a motion could be required here because the Colorado Attorney General may not be considered the state sponsor where the state already appears through the representation of another governmental entity in the caption of the case.

2. The respondent, through his counsel, the Colorado State Public Defender, has refused to consent to the filing of the *amici* brief.

3. The *amici curiae* have a substantial interest in seeing this holding reviewed because they are all organizations with law enforcement responsibilities in their respective jurisdictions. The holding of the Colorado court purports to construe the Fourth and Fourteenth Amendments of the United States Constitution, both of which are binding on the *amici*.

4. The brief of the *amici curiae* sets forth the question of law raised by the Colorado Supreme Court opinion in a broader context than that presented by petitioner. Perhaps more importantly, the *amici* brief serves to further demonstrate the source of the confusion surrounding this issue and the need for this Court's

authoritative guidance on the point.

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QUESTION PRESENTED FOR REVIEW

Whether the independent source doctrine, rather than the attenuation doctrine, governs the admissibility of confessions obtained after police have discovered separate and adequate grounds to justify what was initially an illegal arrest.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

INTRODUCTORY STATEMENT 1

STATEMENT OF THE CASE 1

INTEREST OF AMICI CURIAE 2

REASONS FOR GRANTING THE WRIT 3

I. The Colorado Supreme Court Has Decided An Important Question of Federal Law Which Has Not Been, But Which Should Be, Settled By this Court. Lower Courts Throughout the Country Are Struggling to Properly Assess the Impact of Police Discovery of Intervening, Independent, and Adequate Grounds to Arrest Upon the Admissibility of Confessions Which Would Otherwise Be Suppressible As Fruits of Illegal Arrests. The Courts Have Inconsistently Applied An Attenuation Analysis, Rather than the Much Simpler and More Appropriate Independent Source Doctrine. This Has Resulted In the Suppression of Highly Relevant and Reliable Evidence For Reasons Wholly Unrelated to Either the Actual Harm Suffered by the Suspect or A Proper Consideration of the Role of Deterring Police Misconduct. 3

TABLE OF CONTENTS

PAGE

CONCLUSION 9

TABLE OF AUTHORITIES

CASES **PAGE**

Brown v. Illinois, 422 U.S. 590 (1975) 2, 3, 5-7, 9

Government of Virgin Islands v. Gerau, 502 F.2d 914 (3rd Cir. 1974) 7

Johnson v. Louisiana, 406 U.S. 356 (1972) 5, 6

Miranda v. Arizona, 384 U.S. 436 (1966) 1

Murray v. United States, 487 U.S. 533 (1988) 5

Nardone v. United States, 308 U.S. 338 (1939) 4

New York v. Harris, 110 S.Ct. 1640 (1990) 6-8

Nix v. Williams, 467 U.S. 431 (1984) 5

People v. Jones, 828 P.2d 797 (Colo. 1992) 2, 9

Scott v. United States, 436 U.S. 128 (1978) 8

Segura v. United States, 468 U.S. 796 (1984) 5

Silverthorne Lumber Company v. United States, 251 U.S. 385 (1926) 4

State v. Thompson, 438 N.W.2d 131 (1989) 7

Taylor v. Alabama, 457 U.S. 687 (1982) 6, 7

TABLE OF AUTHORITIES

CASES **PAGE**

United States v. Calandra, 414 U.S. 338 (1974) 8

United States v. Ceccolini, 435 U.S. 268 (1978) 5

United States v. Leon, 468 U.S. 897 (1984) 5

Whiteley v. Warden, 401 U.S. 560 (1971) 8

Wicker v. State, 667 S.W.2d 137 (Tex. Ct. Crim. App. 1984) 4

Wong Sun v. United States, 371 U.S. 471 (1963) 4, 5

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV 2, 4, 8, 9

U.S. Const. Amend. V 5

U.S. Const., Amend. XIV 2

TABLE OF AUTHORITIES

OTHER AUTHORITIES **PAGE**

OTHER AUTHORITIES

W. LaFave *Search and Seizure* (4th ed. 1987)

Vol. 1, § 1.4(d) at 90 9

Vol. 2, § 3.5(d) at 20 n.71 8

Vol. 4, § 11.4(a) at 374-78 5

Vol. 4, § 11.4(b) at 392 9

INTRODUCTORY STATEMENT

Pursuant to Rule 37 of the rules of this Court, the Colorado Attorney General and the amici states by their Attorneys General respectfully submit this Brief as *amici curiae* in support of petitioner here.

STATEMENT OF THE CASE

The respondent here was charged in Denver, Colorado, with first-degree murder. On interlocutory appeal by the local district attorney, the Colorado Supreme Court upheld the suppression of the murder weapon and statements which respondent gave to the police.

Respondent confessed twice to police following what was later determined to be an illegal arrest. Respondent had waived his *Miranda*[1] rights before each statement, and between the two statements the interrogating officer learned from a fellow officer that respondent was wanted on an outstanding warrant for an unpaid fine on a municipal offense. The officers neither verified the existence of the warrant nor informed respondent about it prior to his making the second statement. The warrant's existence was, however, subsequently verified (*See* People's Exhibits 3 & 4).

Respondent's second confession, which was videotaped, lead to the discovery of the murder weapon in the case, *i.e.*, a hammer.

The trial court suppressed respondent's statements and the hammer as being fruits of an illegal arrest. The district attorney's office appealed, claiming, *inter alia*, that because the warrant independently justified respondent's custody, it served as an intervening factor breaking the causal connection between the initial illegality and the acquisition of the second statement and the hammer.

---

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The Colorado Supreme Court disagreed, however, finding, under *Brown v. Illinois*, 422 U.S. 590 (1975), that the warrant could "not constitute an intervening factor sufficient to remove the taint" of the initial illegality because it "did not contribute to the defendant's ability to exercise his free will." *People v. Jones*, 828 P.2d 797, 800-01 (Colo. 1992).[2]

INTEREST OF AMICI CURIAE

The *amici* here have a substantial interest in seeing this holding reviewed because they all have law enforcement responsibilities within their respective jurisdictions. The holding of the Colorado court purports to apply the Fourth and Fourteenth Amendments to the United States Constitution, both of which are binding on the *amici*.

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[2] Although there was a dispute in the trial court over the manner in which the warrant was issued, the Colorado Supreme Court never addressed this question of state law but instead resolved the federal question on the assumption that the warrant was valid.

REASONS FOR GRANTING THE WRIT

I. The Colorado Supreme Court Has Decided An Important Question of Federal Law Which Has Not Been, But Which Should Be, Settled By this Court. Lower Courts Throughout the Country Are Struggling to Properly Assess the Impact of Police Discovery of Intervening, Independent, and Adequate Grounds to Arrest Upon the Admissibility of Confessions Which Would Otherwise Be Suppressible As Fruits of Illegal Arrests. The Courts Have Inconsistently Applied An Attenuation Analysis, Rather than the Much Simpler and More Appropriate Independent Source Doctrine. This Has Resulted In the Suppression of Highly Relevant and Reliable Evidence For Reasons Wholly Unrelated to Either the Actual Harm Suffered by the Suspect or A Proper Consideration of the Role of Deterring Police Misconduct.

Like nearly every other appellate court, *see* Pet. Cert. at 8-11, the Colorado court analyzed the exclusionary rule issue here from a *Brown v. Illinois* "attenuation" perspective. Despite this apparent agreement, there is a tremendous split among the jurisdictions about how to squeeze independent grounds to arrest into the terms of the "attenuation" analysis.[3] Review is not sought here simply to determine which side of the split should prevail, but

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[3] As demonstrated in the petition, some courts find intervening, independent grounds to arrest irrelevant, while other courts find those grounds if defendants are confronted with them. Where intervening, independent grounds to arrest are determined to be relevant, some courts consider them as simply one factor to be considered, while other courts find them to be dispositive. *See* Pet. Cert. at 8-11.

because the lack of agreement itself results from the application of the wrong test. The application of the "attenuation" analysis is at odds with basic Fourth Amendment exclusionary rule principles which should result in the use of "independent source" analysis.[4] The problem, of course, is that the differences between the "attenuation" and "independent source" doctrines have, at times, been blurred, particularly in the context of confessions. Review here is necessary, then, to authoritatively demonstrate to the courts across the country that which should always have been evident but which has remained obscure.

Pursuant to *Wong Sun v. United States*, 371 U.S. 471 (1963), both the direct and indirect "fruits" of an illegal arrest are excluded as evidence from trial. Ever since *Wong Sun*, however, the issue has been how to determine just what is and what is not a "fruit" of an illegal arrest. The controlling question has been "whether, granting the establishment of the primary illegality, the evidence to which the instant objection is made has been come at by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 487-88. Two situations which the Court in *Wong Sun* recognized would "purge" the "taint" of an illegal arrest were where the government learned of the disputed evidence from or through "an independent source" **and** where the "connection between the lawless conduct of the police and the discovery of the challenged evidence has become so attenuated as to dissipate the taint" of the illegality. *Id.* at 487.

The "independent source" doctrine had its genesis in *Silverthorne Lumber Company v. United States*, 251 U.S. 385 (1926); the "attenuation" doctrine, in *Nardone v. United States*, 308 U.S. 338 (1939). The two doctrines differ greatly. An "independent source" for evidence refers to a separate, legitimate avenue for obtaining

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[4] To date, only one court has used an "independent source" analysis in this context. *See, e.g., Wicker v. State*, 667 S.W.2d 137 (Tex. Ct. Crim. App. 1984).

evidence which serves to displace the initial illegal "cause" for its acquisition. 4 W. LaFave, *Search and Seizure*, § 11.4(a) at 374-78 (4th ed. 1987). "Attenuation" refers not to the displacement of the initial illegality, but to the diminution of its force to a point where the purpose of deterring future police misconduct would not realistically be furthered by excluding the evidence. *Id.* at 374-76.

Since *Wong Sun*, the Court has continued to write about "independent source," *e.g. Murray v. United States*, 487 U.S. 533 (1988), and "attenuation," *e.g. United States v. Ceccolini*, 435 U.S. 268 (1978),[5] but has tended to blur their distinctions. In *Segura v. United States*, 468 U.S. 796, 804-05 (1984), for instance, this Court discussed the independent source doctrine as if it were merely a subset of the attenuation doctrine.

In *Brown v. Illinois*, this Court utilized a multi-factor "attenuation" analysis -- including a consideration of "intervening" factors -- to determine whether a confession was the fruit of an arrest which was illegal because it was lacking in probable cause. The *Brown* Court's ultimate emphasis on determining whether a confession was sufficiently an act of free will apart from Fifth Amendment voluntariness concerns was picked up and indiscriminately used by courts whenever a confession was preceded by some type of police action which rendered the initial arrest illegal. *See* Pet. Cert. at 8-11.

This Court did little to change the perception that an "attenuation" analysis always applied to confessions after an illegal arrest. While the Court recognized that independent, adequate grounds for continued detention could effectively be an independent source for obtaining other types of evidence, *see, e.g., Johnson v.*

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[5] The Court has also, or course, written about the concepts of "inevitable discovery," *see Nix v. Williams*, 467 U.S. 431 (1984) and "good faith reliance" on warrants, *see United States v. Leon*, 468 U.S. 897 (1984).

Louisiana, 406 U.S. 356, 365 (1972) (lineup identification)[6], it continued to use the multi-factored *Brown* "attenuation" analysis in cases involving confessions. *See, e.g., Taylor v. Alabama*, 457 U.S. 687 (1982). It has never, however, dealt with a confession case involving the impact of intervening, independent grounds to arrest, and it has never suggested that "attenuation" was the only way of "purging" the taint of an illegal arrest from a confession. Although in *Taylor* the Court refused to consider as a "significant 'intervening event'" the acquisition of an arrest warrant before the defendant confessed, *id.* at 691-92, it noted there that the arrest warrant was itself predicated on a comparison of fingerprints found at the scene with those taken from the defendant immediately after his arrest. By implication, the Court might have found the warrant "significant" had it been based on evidence which was itself not the "fruit" of an illegal arrest. *Id.*

It was not until *New York v. Harris*, 110 S.Ct. 1640 (1990), however, that this Court explicitly recognized that the *Brown* "attenuation" analysis was not the exclusive means for admitting into evidence confessions obtained after illegal arrests. In *Harris*, the police had probable cause to arrest the suspect but illegally entered his

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[6] In *Johnson*, the Court noted:

> The validity of Johnson's arrest, however, is beside the point here, for it is clear that no evidence that might properly be characterized as the fruit of an illegal entry and arrest was used against him at trial. Prior to the lineup, ... he was brought before a committing magistrate to advise him of his rights and set bail. At the time of the lineup, the detention of the appellant was under the authority of this commitment. Consequently, the lineup was conducted not by "exploitation" of the challenged arrest but "by means sufficiently distinguishable to the purged of the primary taint."

406 U.S. at 365.

residence without a warrant to make the arrest. The suspect made one incriminating statement inside the residence and another statement an hour later at the police station. This Court held that only the statement made in the house had to be suppressed, because only it was obtained as a result of the specific illegality committed by the police -- the warrantless entry into the house. The stationhouse statement, the Court held, was unaffected by the illegal entry since the police could have subjected the suspect to an arrest outside the house and thereafter taken him down to the station for questioning.

In *Harris*, the Court refused to engage in *Brown*'s multi-factored "attenuation" analysis to determine what effect the fact of lawful custody had on the suspect's exercise of his free will. *Id.* at 1643. Rather, it recognized what it had only implied in *Taylor*, *i.e.*, that a confession cannot be the product of an illegal arrest if the police otherwise have legitimate grounds for holding the individual in custody at the time he or she confesses.

This ought to be the controlling principle here. While, unlike *Harris*, the police did not have adequate grounds at the outset to arrest respondent, like *Harris* they did have adequate, untainted grounds to retain custody of respondent prior to the time he made his second stationhouse statement. As in *Harris*, there could be no valid claim that, after learning of the outstanding warrant, the police here were required to release respondent or that respondent could not be immediately rearrested if momentarily released. *Id.* at 1643. *Cf.*, *Government of Virgin Islands v. Gerau*, 502 F.2d 914, 925 (3rd Cir. 1974) (issuance of a warrant for arrest for failing to appear in court created grounds for fictional "rearrest, providing police with legal custody at time defendant made statements); *State v. Thompson*, 231 Neb. 771, 438 N.W.2d 131 (1989) (after illegally stopping individual, police recognized him as person wanted on an outstanding arrest warrant; held, this "constitutes an intervening circumstance **sufficient to break** the causal connection between the stop and the lineup") (emphasis added).

Harris' "controlling factor" or "independent source" type of analysis is not defeated (as the Colorado court might believe) simply because at the time the police neither verified the existence of the warrant nor explicitly relied upon it as a basis for questioning respondent. With respect to the first point, the issue is not so much the timing of the verification, as the determination at some point in time that the warrant did exist at the time when respondent confessed. *Cf.*, *Whiteley v. Warden*, 401 U.S. 560 (1971) (fellow-officer action will be upheld, if adequate grounds are ultimately determined to have been in the hands of the officer or agency which issued the information). *See also* 2 LaFave, *supra*, § 3.5(d) at 20 n.71. With respect to the second point, this Court, in *Scott v. United States*, 436 U.S. 128, 138 (1978), recognized that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action as long as the circumstances, viewed objectively, justify that action."

Here, the warrant did indeed exist at the time of respondent's confession, and while the police may have originally relied upon the wrong bases for taking respondent into custody, they were aware of proper grounds upon which to retain custody of him prior to his confession. The exclusionary rule exists, not as a personal right of defendants, but as a means of deterring future police misconduct. *United States v. Calandra*, 414 U.S. 338, 347-48 (1974). Because of the substantial and adverse impact it has on the societal interest in punishing criminals, the exclusionary rule is not to be applied where its deterrent effect is, at most, *de minimis*. *E.g.*, *Harris*. That is the case here. Respondent had no Fourth Amendment right to liberty once the police discovered alternate and adequate grounds upon which to detain him; and, as one leading commentator has noted, deterrence would be a legitimate concern in this type of context only if it "may be assumed [that] police will conduct arrests and searches on grounds they know or suspect to be insufficient in the hope that their actions will later be upheld on some other grounds of which they are presently unaware. That assumption, in my view, is fanciful."

1 LaFave, *supra*, § 1.4(d) at 90.

The Colorado court's analysis has unnecessarily deprived the public of highly relevant and reliable evidence upon which to determine guilt in a case involving the most serious of crimes, *i.e.*, first-degree murder. That is troubling enough. But when the decision is viewed in a broader context, *i.e.*, essentially as standard fare throughout the country, then the critical need for this Court's review and correction of analysis is evident. Confessions following acquisition of proper and independent grounds for custody should not be subjected to the *Brown v. Illinois* test, which has been criticized as constitutionalizing the discretion of trial courts. *See* 4 LaFave, *supra*, § 11.4(b) at 392. The time is ripe for this Court to authoritatively find that the deterrent effects on police are too insignificant to impose upon the public the substantial cost of suppression where the suspect has suffered virtually no Fourth Amendment harm from the custody leading up to his confession.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully request that this Court issue a writ of certiorari to review the Colorado Supreme Court decision *People v. Jones*.

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No. 92-172

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

THE STATE OF COLORADO
Petitioner,

vs.

NORRIS JONES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

On Petition For Writ Of Certiorari To The Colorado Supreme Court

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16 pp

TABLE OF CONTENTS

PAGE

Table of Authorities.....i

Question Presented for Review.....2

Statement of the Case.....2

Reasons for Denying the Writ.....7

Conclusion.....13

Certificate of Service.....13

TABLE OF AUTHORITIES

CASES PAGE

Brown v. Illinois.....7, 8, 10, 11
422 U.S. 590 (1975)

Dunaway v. New York.....7, 8
442 U.S. 200 (1979)

Illinois v. Gates.....11
462 U.S. 213 (1983)

Murray v. United States.....11
487 U.S. 533 (1988)

New York v. Harris.....7
495 U.S. 14 (1990)

People v. Jones.....8, 13
828 P.2d 797 (Colo. 1992)

Taylor v. Alabama.....7, 8
457 U.S. 687 (1982)

Townsley v. State.....10
652 S.W.2d 791 (Tex.Crim.App. 1983)

United States v. Cherry.....10
759 F.2d 1196 (5th Cir. 1989)

United States v. Maier.....10
720 F.2d 978 (8th Cir. 1983)

United States v. Morris.....10
592 F.2d 341 (2d Cir. 1979)

United States v. Tucker.....10
610 F.2d 1007 (2d Cir. 1979)

Wicker v. State.....10
667 S.W.2d 137 (Tex.Crim.App. 1984)

Wong Sun v. United States.....7
371 U.S. 471 (1963)

STATUTES

Section 16-1-104(18) 8A Colo. Rev. Stat. (1986)....9

RULES

Colo. R. App. P. 4.1(f).....12

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QUESTION PRESENTED FOR REVIEW

Whether the Colorado Supreme Court correctly held that no significant intervening factor existed to attenuate the custodial statements of Norris Jones from his arrest without probable cause?

STATEMENT OF THE CASE[1]

On January 7, 1991 at 3:35 p.m., Detective DeMott received a call on a man found dead in his apartment who appeared to have been beaten. Death may have occurred several days before. The manager of the apartment building told police that he had seen someone with the victim the month before on different occasions, no specific times. The man was seen with the victim, but no one heard them talking and there were no problems.

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1. The factual statement in the Petition contains numerous errors and significant omissions, which will be corrected as follows.

Detective DeMott testified that the description of this man "reminded"[2] him of a man by the name of "Norris" whom he had occasionally contacted, although never arrested, during his years as a street officer (which ended in 1984). Detective DeMott and his partner Detective DeSanti left the apartment building at about 7:00 p.m. and went to the Colorado Cafe a short distance away to see if "Norris" might be there.

Detective DeMott went inside the cafe where he observed Norris Jones, then returned to get his partner.[3] They both entered the cafe, saw Norris at the counter drinking coffee and surrounded him, with Detective DeSanti on the left-hand side and DeMott on the right-hand side.[4]

DeMott testified that he tapped Norris Jones on the shoulder to get his attention, introduced himself, and asked him if the police could talk to him downtown. Mr. Jones appeared to be surprised. DeMott claimed that Norris Jones agreed to go with police, al-

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2. Detective DeMott did not testify that he "recognized" the man (Petition, page 3).

3. The detectives did not testify that they both immediately spotted the defendant at the cafe as claimed (Petition, page 3).

4. Testimony at the suppression hearing established the mental state of Norris Jones: He was committed to a mental hospital as a young child, had prolonged hospitalizations, received anti-psychotic medications and was diagnosed as having organic brain disorder, brain damage, and mental retardation. His early medical records indicated that he was tied to the bed as an infant, beaten, and punished (including being starved for days). He was emotionally deprived and showed early evidence of depression.

He was diagnosed as having an IQ of 66 in 1970 and his mental retardation diagnosis continued. Doctors had found that he had difficulty in coping and perceiving things and that he had difficulty understanding or conceptualizing information he received from people.

Dr. Kathy Morall, a psychiatrist, examined Norris Jones at the county jail several years before and noted his intellectual limitation. She examined him again in April of 1991 and testified at the suppression hearing. The most striking thing Dr. Morall noticed was the limitation in his verbal skills. He was able to communicate, but it was difficult and called for clarification before he could complete responses to her questions. She also noticed his difficulty in comprehension. That was demonstrated not only in the conversations she had with him, but also in the mental status examination when he was asked to do abstractions which were almost impossible for him. He had a very simplistic way of communicating and people had to be careful in the way they discussed things with him or gathered information to be sure he really understood. Dr. Morall testified that there were things that Norris Jones would never understand when she was with him, in spite of the time that she tried to give him.

though his partner did not hear this. Norris Jones had his hands handcuffed behind his back and was escorted out of the restaurant, without being given a chance to pay for his coffee. Concerning the handcuffing, Detective DeSanti testified:

Q Do you know why this individual was handcuffed at that time?

A Joe put the handcuffs on him, that's why he was handcuffed.

Detective DeMott admitted that he and DeSanti had alternatives to handcuffing Mr. Jones: They could have asked him to step outside where any dangerous objects could be removed, they could have had him remove his jackets and pouch either outside the restaurant or in the police car, they could have conducted a thorough pat-down and removed any object that might be a weapon, and they could simply have questioned him at the restaurant about whether he knew the victim and what he might know about the victim's death. Detective DeMott also admitted that in his own prior contacts with Mr. Jones he had never seen him with a weapon and that police had no information from anyone that Mr. Jones had been seen with a weapon. In fact, Mr. Jones was found to have no weapons on him.

Detective DeMott testified that the proper police procedure is that after a stop and frisk, the police either arrest a person or let them go; DeMott admitted this was not done here. Mr. Jones was placed in the police car, but instead of driving to the police station, DeMott drove back to the apartment house for a one-on-one show up, where Norris Jones was identified by the manager as a person who had been seen with the victim the month before.

At the apartment house, in the police car, Detective DeMott admitted that he had another conversation with Norris Jones. He told Mr. Jones they were going to go to headquarters and ask him some questions, that the handcuffs would come off at the police station, and that after he spoke with police he would be free to leave. Police never explained why Mr. Jones had been picked up or what was happening.

Once at the police department, Mr. Jones was finally unhandcuffed and asked to remove his pouch and coats. (No attempt was made to pat-down his pants although DeMott had claimed earlier that he was concerned about the pants containing a weapon.) DeSanti left to check the police records.

Police advised Mr. Jones of his Miranda rights and was finally told why police wanted to talk to him. DeMott told Mr. Jones about the homicide and said police wanted to talk to him because he may have been one of the last people to see the victim. Mr. Jones said he knew the victim, had been over to his apartment, but didn't know him that well; he told police he hadn't seen the victim in a couple of weeks.

DeMott told Norris Jones that the victim had been murdered; Mr. Jones denied any involvement. DeMott persisted and told Mr. Jones to tell him what he knew about the murder, and Mr. Jones repeated that what he knew was that he didn't do it. Mr. Jones was not released, and the custodial interrogation continued.

DeMott admitted that he told him, "Well, you know, we do have some blood with a fingerprint on the railing in the apartment building." DeMott claimed at the hearing that he thought he had seen a fingerprint in the blood, although there was no lab report of any such print; DeMott claimed he had asked the lab to compare the print at the scene just before he began questioning Mr. Jones (there was no lab report of any such request or comparison). DeMott admitted that there was no indication in his own report that he had spoken with anyone from the lab about a fingerprint and that it would be unusual for the lab not to file a report if a request had been made. On cross-examination he admitted that perhaps no lift of any "print" was ever done. The trial court in its written findings held:

> Given the fact that the lab crew did not preserve the "print", the Court finds that Detective DeMott was told at the scene that the "print" had no evidentiary value. Nevertheless, intending to elicit an incriminating response, Detective DeMott told the Defendant that a fingerprint had been found in some blood on the railing.

At the hearing, DeMott testified that Mr. Jones told him he was worried he would go to prison if he told; DeMott told him "Norris, you have to tell us what happened, you have to give us your side of it; otherwise we will never know what your side of the story is." At this point, Mr. Jones began to cry as he told DeMott that the victim had repeatedly tried to have sex with him, attempted to grab him and take off his clothes and that Mr. Jones tried to push him away, telling him over and over that he didn't do that sort of thing with men. He told Detective DeMott the victim tried to rape him and when he couldn't stop him, he got a hammer and started to strike him with it. He never told police he was trying to kill the man, wanted him dead, or even knew that the man was dead when he left the apartment. Norris Jones continued to cry throughout.

Concerning this statement and the subsequent one, the trial court after viewing the video-taped statement specifically found:

> The first interview lasted fifteen minutes. When Detective DeMott opened the door of the office, he told Detective DeSanti that the Defendant had confessed. Detective DeSanti told Detective DeMott that there might be[5] a warrant out for the Defendant's arrest for an unpaid traffic fine, but that this was unverified. Neither detective attempted to call the County Court to determine the status of the possible warrant. Neither relied on the existence of a warrant for any reason. Neither took the Defendant to the County Court Clerk's Office to pay his fine.[6] (Footnotes added.)
>
> Instead, preparations were made for the video-taped interview. The Defendant was left in the sergeant's office until the video room was ready. Detective DeMott led him to the video room, and at 7:52 p.m. began the second interview by asking the Defendant if he remembered being advised of his rights at 7:20 p.m.. Detective DeMott rapidly repeated the rights while the Defendant looked at the floor. During the procedure, the Defendant was distracted when the alarm on his watch began

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5. The Petition incorrectly states that "DeMott learned from DeSanti that there was a general sessions warrant for the Defendant's arrest" (emphasis added) (Petition, page 4).

6. At the suppression hearing, the prosecution introduced various documents in an attempt to prove the existence of a valid "warrant". Mr. Jones had been arrested October 16, 1990 for loitering; he appeared before a municipal judge and was given a fine and jail sentence, but was not represented by a lawyer. The sheriff later initiated a memo in connection with releasing Mr. Jones early, in which various "credits" were calculated and the amount of money the sheriff believed he now owed was set forth. No judge ever entered that order or was consulted. When the money the sheriff said was owed was not paid, a clerk (not a judge) issued a mittimus based on the sheriff's memo (not a judge's order). The effect of the mittimus was that if Mr. Jones was picked up on something else, he could then be brought before the clerk, pay the balance and be released.

buzzing. He reached over and turned it off. Detective DeMott asked the Defendant to repeat the story he had told him before. Throughout the interview, Detective DeMott reminded the Defendant about what he had said before. He confronted the Defendant with inconsistencies. The detective concluded by reviewing the evening's events with the Defendant and by trying to elicit the Defendant's agreement that he voluntarily accompanied the detectives at the cafe. The Defendant, however, said, "I did come, I didn't fight." Detective DeMott's attempt to elicit confirmation from the Defendant that he had told the Defendant he could leave at any time was met with what can be best characterized as a stare of disbelief from the Defendant.[7] The second interview concluded at 8:09 p.m..

REASONS FOR DENYING THE WRIT

THE COLORADO SUPREME COURT CORRECTLY DECIDED THAT THE TAINT OF THE ILLEGAL ARREST RENDERED MR. JONES' CONFESSIONS INADMISSIBLE UNDER THE ATTENUATION ANALYSIS ANNOUNCED IN BROWN v. ILLINOIS

Where a Defendant is arrested without probable cause, a confession subsequently obtained is inadmissible unless the effects of the illegal arrest have become so attenuated so as to dissipate the taint of the illegal police actions. Wong Sun v. United States, 371 U.S. 471 (1963).

In Brown v. Illinois, 422 U.S. 590 (1975), this Court established a three-factor test for determining whether, under "the facts of each case," with no single fact being dispositive, the taint of an illegal arrest has become sufficiently attenuated so as to allow admission of a confession obtained following the arrest. "The voluntariness of the statement is a threshold requirement." Id. at 604.

In Dunaway v. New York, 442 U.S. 200 (1979) and Taylor v. Alabama, 457 U.S. 687 (1982), this Court applied the Brown test and found the confessions resulting from illegal arrests inadmissible. In New York v. Harris, 495 U.S. 14 (1990), this Court held a confession following an arrest made with probable cause, but without a warrant was admissible. Since in Harris the illegality of the arrest was caused by the absence of a warrant rather than the absence of probable cause, the illegality dissolved once the Defendant was outside his home;

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7. The trial court's specific findings on this issue contradict the claim by the prosecution in its Statement of the Case that "at their request Norris agreed to talk with them and to go with them to the police station" (Petition, page 3).

his incarceration was not illegal. Due to the fact that there was no illegal custody, there was no taint. As a result, no attenuation analysis was necessary in order to determine the admissibility of the subsequent confession.

In this case, the Colorado courts correctly applied the federal constitutional standards announced in Brown and followed in Dunaway and Taylor. The Colorado Supreme Court clearly limited its holding to the unique facts of this case:

> Clearly, the Defendant's second confession did not constitute an act of free will sufficient to purge the primary taint of the illegal arrest. Jones' second confession stemmed directly from the first confession which was interrupted by the detective asking Jones if he would repeat the statement on video-tape. In fact, only a mere fifteen minutes elapsed between the first and the second confession, during which time the officers prepared the video-tape equipment. Further, the circumstances of the illegal arrest did not change between the first and second confession. During the time, Jones was left alone in the same room where he had made his first confession. He did not talk to an attorney, or anyone else, between the two confessions. We hold that because the second confession was closely related in time and by circumstances to his earlier, illegally induced statement, the second confession is inadmissible, despite the fact that Miranda warnings were given before the second interview began.
>
> . . .
>
> We agree with the District Court's conclusion that the existence of this unverified warrant, of which the Defendant had not been informed, did not contribute to the Defendant's ability to exercise his free will. In fact, the evidence supports the conclusion that the Defendant's confession did not constitute an act of free will. Thus, the existence of the warrant did not constitute an intervening factor sufficient to remove the taint from the derivative evidence.

People v. Jones, 828 P.2d 797, 800-801 (1992).

The State claims that the clerk-issued mittimus for the non-payment of a fine constituted probable cause to place Mr. Jones in custody and that this operated as a break in the causal chain resulting from his illegal arrest so as to dissipate the taint of the arrest. There are a number of problems with the State's contentions.

1. The prosecution failed to meet its burden of establishing that the mittimus was in fact an "arrest warrant". Although the trial court and the Colorado Supreme Court referred to the mittimus as an arrest warrant, under Colorado Statutes an "arrest warrant" is

"a written order issued by the judge of a court of record directed to any peace officer commanding the arrest of the person named or described in the order." Section 16-1-104(18) 8A Colo. Rev. Stat. (1986)[8] (Emphasis added) Since the mittimus was issued by a court clerk and not by a judge, a serious question exists as to whether the mittimus constituted a valid "arrest warrant".

2. Even assuming that there was a valid arrest warrant, both the trial court and the Colorado Supreme Court concluded that the prosecution had failed to meet its burden of establishing the validity of the warrant as constituting authority to place Mr. Jones in custody or that the police relied in any way on the warrant as constituting authority to retain Mr. Jones in custody. In its suppression order, the trial court stated: "The prosecution fails, however, to adequately explain how the existence of this warrant, which had not been verified, which was not relied upon by the police, and whose existence had not been communicated to the Defendant, could possibly have contributed to his ability to consider his options carefully and objectively to exercise his free will." Order at B-10, Petition.

3. In light of the substantial testimony presented at the suppression hearing as to Mr. Jones' mental deficiencies and the coercive police conduct involved in the apprehension and questioning of Mr. Jones, there is a serious question whether Mr. Jones' statements were voluntary. Apparently because it found that the statements should be suppressed by application of the derivative evidence exclusionary rule, the trial court did not address the issue of the voluntariness of the statements obtained from Mr. Jones.

4. In light of the fact that the police were only aware of the first name of Norris Jones, the question remains whether they could have "arrested" him on the clerk-issued mittimus.

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8. In its order of suppression, the trial court stated, "the defense successfully demonstrated that the warrant was not issued by a magistrate after a determination of probable cause." Order at B-11, Petition.

The State offers a number of cases for the proposition that probable cause constitutes either an independent basis for retaining custody or an intervening event which dissipates the taint of the illegal arrest. Many of these cases are distinguishable. In United States v. Cherry, 759 F.2d 1196 (5th Cir. 1985), there was no confession at issue; the Court dealt with fingerprint evidence and the applicability of the exclusionary rule. Likewise, in United States v. Maier, 720 F.2d 978 (8th Cir. 1983), the issues surrounding the exclusionary rule were not on point since the question presented centered around the search of a car following a legal inventory search despite an initial illegal stop.

In Townsley v. State, 652 S.W.2d 791 (Tex.Crim.App. 1983), the Court held that the discovery of probable cause to arrest the Defendant while being held illegally was a factor to be considered under the attenuation analysis and under the circumstances of the case, the taint had sufficiently dissipated. There the Defendant's confession was sufficiently attenuated from his illegal arrest where he confessed nearly 30 hours after the arrest and 23 hours after probable cause existed to legally arrest him; in addition, the facts established the confession was truly the exercise of Defendant's free will.

In United States v. Tucker, 610 F.2d 1007 (2d Cir. 1979) and United States v. Morris, 592 F.2d 341 (2d Cir. 1979), both cases were remanded for further findings. Neither case held that discovery of independent grounds to legally arrest was "dispositive" and that the attenuation analysis under Brown was inapplicable. In Morris, the Court remanded in part for a determination of the officer's knowledge of intervening events when questioning Defendant.

In Wicker v. State, 667 S.W.2d 137 (Tex.Crim.App. 1984), the Court declined to decide if the initial arrest was illegal and held that a grand jury indictment subsequent to the arrest as well as significant attenuation (confession made five days after arrest) permitted admission of the confession.

The State asserts that the Colorado Supreme Court ignored the effect of an outstanding arrest warrant in applying the attenuation analysis of Brown. The State misperceives the Colorado court's ruling. The Colorado Supreme Court merely held that the State had failed to meet its burden of establishing that a valid independent basis for subjecting Mr. Jones to custodial arrest existed and was relied on by the police as a basis for continuing its custody of Mr. Jones, following his admittedly illegal arrest. The Colorado court did not dismiss the existence of a valid arrest warrant from the attenuation analysis; it simply held that the State had failed to establish as a factual matter the existence of probable cause to hold Mr. Jones independent of the initial illegal arrest. It did not hold that there could never be such a situation, only that it was not established in this case.

The State also asserts that the issues of this case are not "case specific". This is obviously wrong. Nothing could be more case-specific than a situation where ambiguous information is contained in the court file, which may or may not constitute probable cause to arrest, and it is not clear whether the police relied on that information as a basis for retaining custody of the Defendant. The situation here is so full of ambiguities that it is not only unlikely to be repeated, but in addition the ruling on the factual situation in this case would have little precedential value.

The Amici Curiae request that this Court promulgate a decision which would graft the independent source doctrine, see, e.g., Murray v. United States, 487 U.S. 533 (1988), onto the attenuation analysis of Brown. The wisdom of such a course of action is questionable at the least in light of the fact that such a contention was never "pressed or passed upon" by the State in the Colorado courts (and there is but slight mention of such an approach in the State's Petition for Certiorari). See Illinois v. Gates, 462 U.S. 213 (1983).

The State represents that this case should be reviewed by this Court in that it involves "an extremely small record of a two-witness hearing, minimizing any disputes of historical fact and making it extremely unlikely that the ultimate rule of decision could involve issues

that are not already apparent". (Petition at 6-7) The State's contention is inaccurate. The hearing lasted for two days, with a third day for argument. Four separate witnesses testified. The total transcript involves three volumes and approximately 347 pages.

The prosecution's claimed urgency to have this Court accept this case for review was not duplicated when the Colorado Supreme Court was likewise asked by the prosecution to stay the trial proceedings and accept this case for immediate review. The cases the prosecution now claims should be dispositive were not cited by the prosecution to the Colorado Supreme Court (only three of a total of 24 cases now cited in the Petition were offered by the prosecution in their appeal to Colorado's Supreme Court). The prosecution further chose to forego its fight to file a Reply Brief pursuant to Colo. R. App. P. 4.1(f), which not only evidences a lack of concern over the issues at the time the Colorado Supreme Court was considering it at its request, but raises questions of whether the prosecution has, in fact, properly exhausted all remedies at the State level.

CONCLUSION

The Respondent, Norris Jones, respectfully requests that this Court deny the petition for writ of certiorari to review the decision of the Colorado Supreme Court in People v. Jones, 828 P.2d 797 (Colo. 1992).

Dated this ____ day of August, 1992.

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Colorado State Public Defender

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CERTIFICATE OF SERVICE

I, Thomas M. Van Cleave III, hereby certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was served on Nathan B. Coats, Chief Deputy District Attorney, Denver District Attorney's Office, 303 West Colfax Avenue, Suite 1300, Denver, Colorado 80204 on August 26, 1992.

Thomas M Van Cleave III

No. 92-172

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

THE STATE OF COLORADO,
Petitioner,
vs.
NORRIS JONES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

I, NATHAN B. COATS, a member of the Bar of this Court, hereby certify that on this 3rd day of September, 1992, a copy of the PETITIONER'S REPLY TO BRIEF IN OPPOSITION in the above-entitled case was mailed, first class postage prepaid to counsel for respondent herein, Sunwolf, Deputy State Public Defender and Lauren Cleaver, Deputy State Public Defender, 110 - 16th Street, Suite 1300, Denver, Colorado 80202. I further certify that all parties required to be served have been served.

NATHAN B. COATS, Esq.
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Counsel for Petitioner

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ON PETITION FOR WRIT OF CERTIORARI
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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The Respondent, in his Brief in Opposition, asserts that the question presented by the petition is not properly before this court for the reason that the arrest warrant in question failed to meet the definition of an "arrest warrant" in the state statutes and would not have given the police *valid* authority to arrest him. (The actual existence of the warrant was not in question, and it was introduced at the suppression hearing as People's Exhibits 3 and 4.) While the Respondent challenged the way in which the municipal warrant was issued and the state directly contested the ruling of the district court on this point in its interlocutory appeal, the Colorado Supreme Court found it unnecessary to even notice the issue. Instead, without questioning the validity of the warrant, it held as a matter of federal constitutional law that the existence of the warrant, "of which the defendant had not been informed," did not constitute an intervening factor sufficient to remove the taint

from the derivative evidence. *See* Petition for Writ of Certiorari, Appendix A at A-9. The Colorado Supreme Court's opinion is based on the existence of a valid arrest warrant, and it is that construction of federal law with which the People of Colorado are saddled.

Also contrary to the assertion of the Respondent, the question whether the discovery of the arrest warrant was sufficient to remove the taint from the derivative evidence was the specific question presented to and ruled on by the Colorado Supreme Court. In fact, the state's decision not to actively contest the district court's finding of an initial illegality made it the *sole* question for review. The precise limits of terms like "attenuation" and "independent source" and their relation to each other has never been entirely clear, and at times this court has even referred to the latter as being a subset of the former. *See, e.g., Segura v. United States,* 468 U.S. 796, 804-05 (1984). Any differences in emphasis in the way the issue has been presented to this court derive directly from the way in which the Colorado Supreme Court resolved the question below.

The Respondent asserts that there is a serious question whether his statements were even voluntary, and that this court should therefore not address the Fourth Amendment issue presented by the Petition. Although the Respondent raised this issue at the suppression hearing and a major portion of the evidence presented at the hearing is addressed to it rather than the issue presented by the Petition, neither the district court nor the Colorado Supreme Court made any ruling about the voluntariness of the defendant's statements on Fifth/Fourteenth Amendment grounds. To the extent that the term "voluntary" appears at all in either ruling, it is clearly in the context of evaluating the taint from a Fourth Amendment violation.

With regard to the Respondent's claim that the state's choice not to file a reply brief in the state supreme court "raises questions of whether the prosecution has, in fact, properly exhausted all remedies at the State level," Colo. R. App. P. 4.1(f) permits but does not require the state to file a reply brief in an interlocutory appeal, as is evidenced by the fact that the Colorado Supreme Court did not dismiss but decided and published its resolution of this federal question. The relevant question for purposes of certiorari to the Colorado Supreme Court is whether it has rendered a "final decision" within the meaning of 28 U.S.C. §1257, which it has. *See* Petition at 2 n.1.

Lastly, although it is without significance for the issue presented for review, the Respondent liberally criticizes the Petition's recitation of the facts of the case, apparently preferring portions of the testimony or the district court's ruling to the Colorado Supreme Court's published opinion relied on in the Petition.[1]

The Respondent has not suggested any reason why the issue presented by the Petition is not an important one but only why he considers the issue not properly postured for review in this case. For the foregoing reasons, the issue *is* properly postured in this case, and for all the reasons given

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[1]As but one example, compare the Respondent's footnote 7 disputing that he agreed to talk to the police and go with them to the station, with the supreme court opinion, *see* Petition at A-3 ("[T]he detectives... asked Jones if they could speak with him. Jones agreed to go downtown with the officers at their request"), and even the language of the district court, *see* Petition at B-3 ("DeMott...told the Defendant that he wanted to talk to him, and asked him to come downtown. The Defendant agreed").

in the Petition and the Brief of the Amici, the issue is of pressing importance and merits resolution by this court.

Respectfully submitted,

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